

Capital Litigation for Arizona Prosecutors

October 28, 2016
Phoenix, Arizona



CASELAW UPDATE

Presented by:

The Honorable Kent Cattani

Arizona Court of Appeals

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ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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Capital Litigation Year-in Review

KENT E. CATTANI, JUDGE, ARIZONA COURT OF APPEALS
OCTOBER 28, 2016

Arizona Supreme Court Cases

- ▶ *State v. Gunches*, 240 Ariz. 198 (2016)
- ▶ *State v. Goudeau*, 239 Ariz. 421 (2016)
- ▶ *State v. Amaral*, 239 Ariz. 217 (2016)
- ▶ *State v. Lynch*, 238 Ariz. 84 (2015)
 - *Lynch v. Arizona*, 136 S. Ct. 1818 (2016)
- ▶ *Busso-Espellan v. Mraz*, 238 Ariz. 553 (2015)
- ▶ *State v. Guarino*, 238 Ariz. 437 (2015)
- ▶ *State v. Leleve*, 237 Ariz. 516 (2015)
- ▶ *State v. Roseberry*, 237 Ariz. 507 (2015)
- ▶ *State v. Carlson*, 237 Ariz. 381 (2015)
- ▶ *State v. Burns*, 237 Ariz. 1 (2015)

Arizona Court of Appeals Cases

- ▶ *State v. Marlinton*, 2016 WL 5219860
- ▶ *Allen v. Sanders*, 239 Ariz. 360 (2016)

► State v. Gunches

- Facts: The victim fought with his ex-wife, who Gunches apparently knew. The victim was dazed after being hit on the head with a telephone. Gunches drove him to the desert rather than the bus station and shot him four times. Gunches pleaded guilty, acknowledged a prior felony conviction for "attempted murder on a cop," and that he did not "have any mitigation." Ariz. S. Ct. reverses first death verdict on the basis that the especially heinous and depraved aggravating circumstance not established (because more than helplessness and lawlessness - here State alleged gratuitous violence). Ariz. S. Ct. says not clear that Gunches was aware first shots fired in rapid succession were fatal, thus no gratuitous violence not established.

► Resentencing - again resulted in death sentence

- Gunches argued on appeal that the trial court fundamentally erred by allowing him to represent himself during the penalty phase on remand. He also argued a defendant should not be allowed to waive mitigation.
- It: As long as a defendant knowingly, intelligently, and voluntarily waives right to counsel, he may represent himself during the penalty phase. See also Bedrup, 221 Ariz. at 173. And, Ariz. S. Ct. has repeatedly held that a defendant may waive mitigation.
- Gunches also challenged legal sufficiency of (F)(2) aggravator. It: by stipulating to P2 aggravator, he is foreclosed from challenging it on appeal. "A defendant may challenge the legal sufficiency of an alleged aggravating circumstance by motion filed pursuant to Rule 18." Moreover, any challenge to the validity of a prior conviction must be made through a challenge (PCR) in the prior case.

► Response to Jury Question during deliberations:

- "If the two cases were tried in reverse order, i.e., the Ted Price murder first, then the attempted murder of the DPS officer, would the State still be seeking the death penalty?" Without objection, trial court answered that the order of the cases had no legal significance.
- It: No error. Although the trial court's answer was "somewhat unresponsive," the order of the cases was not legally relevant because, at the time of the penalty phase, Gunches had stipulated to the La Paz conviction.
- Prosecutorial misconduct - based on closing argument in which prosecutor stated that "there's no mitigation as to the defendant's character, propensity, history, record, and there is certainly no mitigation in the awful and ugly circumstances of Ted Price's death."
- It: argument supported by the record. Gunches acknowledged that no mitigation was presented and he declined to accept responsibility during allocution. The fact that he pleaded guilty did not necessarily establish that he accepted responsibility.

► State v. Gaudreau (Baseline Killer) - had served 13 years for robbery/assault

- Convicted of nine first-degree murders and a string of other crimes, including sexual assaults, involving 34 other victims. Crimes occurred between August 2003 and June 2006.
- 70-day trial spanning 7 1/2 months. During testimony of first mitigation witness in penalty phase, Gaudreau waived any further mitigation and prevented no further evidence. Death verdict on all nine murder charges.
- Trial issue: consumption of DNA evidence - It ok to consume evidence post-indictment because prosecutor sought permission from court prior to consumption.
- Motion to sever: Gaudreau moved to sever the seventy-four offenses charged, seeking separate trials for either the thirteen different incidents or, alternatively, for the capital and noncapital charges. It: No error - identity was the only disputed issue, and State could properly introduce other-did evidence of similar attitudes and actions of the perpetrator in the different chapters. Same comes backed by DNA, often by m.o. of killing victims he was involved in a robbery and his buddy left him behind. Also similar m.o. of taking sexual assault victims to secluded area, threatening to shoot if they did not comply with his demands, and telling them not to look at him.
- Right to Counsel: Although Gaudreau raised concerns about his counsel's lack of preparation, he affirmed that he would continue to work with them and did not expressly complain further about counsel.
- Prosecutorial misconduct: prosecutor's comments during opening statement likening Gaudreau to a "wolf" and a "wolf in sheep's clothing" were improper, but not improper during closing argument because there was substantial evidence Gaudreau attempted to conceal his identity by wearing disguises. Any error from opening statement harmless - see Carter reference to "monster" and "inh" harmless).
- Closing argument in penalty phase: "Not once did this defendant stand before you and comment about the harm he has inflicted. Not once did he talk about what agon of these 9 victims endured at his hands. Rather, he stood before you and denied responsibility. Guilt is no longer the issue." It: not improper comment on invocation of fifth Amendment right because Gaudreau chose to allocate and told the jury he was not a wolf in sheep's clothing and not a monster. Prosecutor's argument proper rebuttal.

- Sentencing Issues:
- Using the same felonies as felony-murder predicates, (f)(2) aggravation, and separately punished crimes does not result in a double jeopardy violation.
- (f)(2) doesn't adequately narrow the class of death-eligible defendants if predicate crime supporting a felony-murder conviction may also be used as a prior serious felony conviction. Previously rejected in *Forde*, 233 Ariz. at 569.
- Rebuttal to Mitigation: Goudeau called one witness during the penalty phase, mitigation expert Dr. Mark Cunningham, who opined that Goudeau would have a positive adjustment to prison if sentenced to a life term and would pose a low likelihood of violence. Also asserted adverse developmental factors that shaped Goudeau's decision-making ability. State sought to introduce transcripts from interviews of two of Goudeau's sisters, whom Cunningham had interviewed in forming his opinion. Goudeau objected, but acknowledged that the interviews related to his family background and that defense counsel attended those interviews. No error.
- After Goudeau allocated (expressing remorse for 1989 crimes, State sought admission of transcript from a 2004 parole hearing, in which he similarly told parole board he had learned from time in prison. No error in admitting transcript.

- Goudeau knowingly, voluntarily, and intelligently waived mitigation.
- Court noted that *Hausner* (decided before Goudeau) sets forth procedures to apply when a capital defendant elects to waive mitigation. Here trial court took many of the steps recommended in *Hausner*, and there is no indication his decision to waive resulted from a complete breakdown in communication with counsel.
- Defense counsel not required to present mitigation over the defendant's objection: "Although a minority of courts have held that mitigation must be presented even over the defendant's objection, we have found 'more persuasive the majority of courts that . . . have held that a capital defendant may waive the presentation of mitigation.'"

- *State v. Amara*, 239 Ariz. 217 (2016) (Dickens co-defendant) (life sentence)
- Amara alleged that evidence of advances in juvenile psychology and neurology supported a colorable claim of newly discovered evidence. Trial court denied petition for post-conviction relief, as did court of appeals and Arizona Supreme Court.
- Court clarifies standard for entitlement for a Rule 32 evidentiary hearing***
- The relevant standard is NOT whether, if defendant's allegations are true, they "might have changed the outcome." Instead, the per court must find that the allegations, if true, "would probably have changed the verdict or sentence."
- Court applies *State v. Bille*, 162 Ariz. at 52, in denying claim. In *Bille*, court found that Bille had symptoms of PTSD at the time of trial, but through no fault of his own, was not diagnosed because it was not a recognized mental condition at the time. In contrast, Amara's juvenile status and imputivity were known at the time of sentencing and were explicitly considered by the trial judge. Hence the condition was not newly discovered.
- Although there had been more research since Amara was sentenced, the research results were not newly discovered material facts because juvenile behavioral tendencies and characteristics were generally known in 1993, and the trial court considered Amara's youth and immaturity at sentencing.

- *State v. Lynch*, 238 Ariz. 84
- First death verdict set aside because jurors told that the (F)(6) aggravator constituted 3 aggravators.
- Resentencing issues:
- H: Defendant was only entitled on remand to a new penalty-phase proceeding, rather than to retry the aggravation phase.
- Court notes that opening statement is not a time to argue the inferences and conclusions that may be drawn from evidence not yet admitted. Here, trial court sustained two of Lynch's objections – to assertion that Lynch's childhood should not be considered a mitigating circumstance because "it happened 30 years ago" and that the defense wanted to "pull at the jury's heart strings" in its presentation of mitigating evidence.
- H: "On balance, although the prosecutor improperly made argumentative statements during opening, we find no reasonable likelihood that the misconduct affected the jury's verdict."

- Closing argument: Not improper to argue that Lynch's substance abuse was not a mitigating factor, but rather something that made the crime worse. H: Although substance abuse can be a mitigating factor, a prosecutor does not commit misconduct by arguing that a mitigating factor does not warrant leniency or that jurors should give it little consideration.
- Trial court sustained defense objection to argument that Lynch's ranting pornographic videos "shows a debasement in the part of his character. And that has already been found, because this murder has been found to be especially heinous and depraved." H: Trial court correctly sustained objection and instructed jury to disregard.
- Not improper to argue that Lynch's difficult childhood was "so remote" that it was "an excuse, not a mitigating factor."
- Reiterated that F6 is only one aggravator and should only be argued as such.
- Trial court sustained objection to "I don't think you can even imagine what it's like for somebody to approach you with a knife. You cannot move and you know they're manhandling you and they are going to cut your throat." H: Improper to invite jurors to place themselves in the victim's position because doing so plays on the jurors' fear of the defendant or sympathy for the victim. I, ct: properly struck argument.
- No objection to quote from a poem indicating that every person's death diminishes society as a whole. "So therefore send no one to find for whom the bell tolls. It tolls for thee." And no objection to "the bell tolls for each and every one of you, in light of the evidence in this case, to return a verdict of death on Shawn Patrick Lynch." H: no fundamental error.

- Other allegations of prosecutorial misconduct
- Attacks on defense experts – during opening, prosecutor told jury that Lynch's expert regarding hepatitis C would testify about the Child-Pugh standard for evaluating chronic liver disease, and opined that the Child-Pugh standard is a subjective standard that "comes from Wikipedia" [Lynch had offered a Wikipedia article]
- Prosecutor asked Lynch's expert, Dr. Jolie Brans (clinical psychologist) if testifying about recollected memories is "really just vouching for what somebody is saying" – no objection, expert said no. H: Prosecutor did not encroach on the jury's evaluation of witness veracity, but rather tested Brans's credibility by attempting to show that she believed interviewees when their story was helpful but was skeptical when their story was not helpful. Only improper remark was a suggestion that Brans "can vouch for people." (objection sustained).
- Other arguments: Appeal to the fears of the jury (response to expert testimony that Lynch could be safely housed in prison), Misstating evidence, ad hominem attacks on defense counsel. H: no error – "Here, although the prosecutor repeatedly suggested that Lynch's defense was not credible, his criticism was directed at defense theories rather than defense counsel."

- *Simmons* claim: "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."
- *H:* *Simmons* applies only to instances where as a legal matter there is no possibility of parole. Here, Section 13-703(A) permitted the possibility of Lynch obtaining release, thus refusing a *Simmons* instruction was not error. Further, even if parole remained unavailable, Lynch could receive another form of release, such as executive clemency.

- United States Supreme Court disagrees regarding *Simmons* claim
- *Lynch v. Arizona*, 136 S. Ct. 1818 (2016)
- *H:* "The Arizona Supreme court thought Arizona's sentencing law sufficiently different from others this court had considered that *Simmons* did not apply. It relied on the fact that, under state law, Lynch could have received a life sentence that would have made him eligible for release after 25 years. But under state law, the only kind of release for which Lynch would have been eligible—as the State does not contest—is executive clemency. And *Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility."
- Dissent (Thomas, joined by Alito):
- "Worse, today's decision imposes a magic-words requirement. Unlike *Simmons*, in which there was "no instruction at all" about the meaning of life imprisonment except that the term should be construed according to its plain and ordinary meaning, here there was an instruction about the nature of the alternative life sentences that the trial court could impose:

- Instruction given: "If your verdict is that the Defendant should be sentenced to death, he will be sentenced to death. If your verdict is that the Defendant should be sentenced to life, he will not be sentenced to death, and the court will sentence him to either life without the possibility of release until at least 25 calendar years in prison are served, or natural life, which means the Defendant would never be released from prison."
- J. Thomas: "Even though the trial court's instruction are a correct recitation of Arizona law, the court holds that *Simmons* requires more. The Court laments that (at least for now) Arizona's only form of early release is executive clemency. So the Court demands that the Arizona instruction specify that "the possibility of release" does not (at least for now) include parole. Due process, the court holds, requires the court to tell the jury that if a defendant sentenced to life with the possibility of early release in 25 years were to seek early release today, he would be ineligible for parole under Arizona law. Nonsense. The Due Process Clause does not compel such "micromanagement of state sentencing proceedings."
- "Today's decision—issued without full briefing and argument and based on *Simmons*, a fractured decision of this court that did not produce a majority opinion—is a remarkably aggressive use of our power to review the States' highest courts. The trial court accurately told the jury that Lynch could receive a life sentence with or without the possibility of early release, and that should suffice."

- *Busso-Estopellon v. Mroz*, 238 Ariz. 553 (2015)
- Special action from Maricopa County Superior Court
- Defendant was charged with capital murder and filed a motion in limine seeking permission to introduce evidence of his willingness to plead guilty in exchange for a sentence of natural life. Trial court denied the motion.
- H: Pretrial offer to plead guilty in exchange for natural life sentence was relevant and admissible.
- Court distinguished *State v. Dann*, 220 Ariz. 351 (2009), in which the defendant unsuccessfully argued that the trial court erred by refusing to admit evidence in the penalty phase showing he had offered before that phase to stipulate to a life sentence and waive his right to parole if the jury did not impose a death sentence. "The defendant in *Dann* never offered to plead guilty, which might have evidenced an acceptance of responsibility."
- In contrast, *Busso-Estopellon* expressed a pre-trial willingness to plead guilty to the charges, which is relevant to his acceptance of responsibility.
- "Of course, the [trial] court may exercise its discretion to determine how best to admit the evidence. For example, the court may permit introduction of part of the offer letter."

- *State v. Guarino*, 238 Ariz. 437 (2015)
- Facts: To be admitted into the Aryan Brotherhood gang, Guarino murdered Chad Rowe. Guarino went with his brother Frank to Chad's residence, brought him out at gunpoint, and drove away in a truck. Chad's body was found in a residential street - he had been stabbed in the hand and foot and shot three times. Frank confessed; Guarino did not, but officers later intercepted a letter in which he admitted committing the murder.
- Two primary issues:
- Admissibility of brother's statement during penalty phase: H: Rules of evidence do not apply during penalty phase. Brother's statement was relevant to whether Guarino should be shown leniency, and admission of brother's statement did not violate due process because statement made available prior to trial and discussed during Chronis hearing.
- Brother's statement directly related to the circumstances of the crime and also rebutted Guarino's assertions that brother bore most of the responsibility for the murder and that members of the Aryan Brotherhood influenced his decision to kill the victim. No due process violation because Guarino had opportunity to challenge the statement. No confrontation clause violation because not applicable during penalty phase. See *State v. McGill*, 213 Ariz. at 158. Court declines to reconsider *McGill* or distinguish it based on fact that declarant in *McGill* died before being subject to cross-examination.

- "As a matter of apparent first impression," - Expert testimony by police officers regarding gang-related activity did not violate defendant's confrontation rights, even if testimony relied on hearsay statements of other members of defendant's gang.
- Court rejects assertion that gang testimony by detectives improperly based on testimonial hearsay given in anticipation of litigation against a class of defendants gang members, either aspirational or fully vested.
- Issue of first impression - look to cases interpreting similar federal rule.
- Cites *United States v. Ayala*, 601 F.3d 256 (4th Cir. 2010) - "There is generally no Crawford problem when an expert applies his training and experience to the sources before him and reaches an independent judgment."
- The detectives based their opinions on trainings, observations, and experiences that collectively formed the bases for their expertise, and neither detective served as a mere conduit for gang members' statements. (Detectives testified about the origins of the Aryan Brotherhood, legal definitions of a criminal street gang, some of the terminology used by the Aryan Brotherhood, the leadership structure, and the significance to the gang of certain tattoos and symbols.)

Arizona Court of Appeals Decisions

- ▶ *State v. Martinson*, 2016 WL 5219860
- ▶ Special action challenging trial court's ruling that prosecutorial misconduct required dismissal with prejudice.
- ▶ Martinson convicted of killing his son. Failed to return child to Mother, and police officers went in his apartment and found him unresponsive, with cuts on his wrist. Son was discovered dead in another bedroom, with a bloody substance coming from his nose. Toxicology test showed a muscle relaxant and isolated methadone in son's blood.
- ▶ Before opening statement, trial judge granted defense motion to preclude evidence that Martinson intentionally killed his son, reasoning that the fact that the State had alleged child abuse as the predicate felony for felony murder barred the State from arguing that Martinson had intentionally killed his son.
- ▶ After conviction, trial court granted motion for new trial based on juror misconduct and error in admitting expert testimony. State sought a new indictment, alleging both felony and premeditated murder. State sought to dismiss earlier indictment. Martinson argued that the later (2012) indictment should be dismissed. Trial court granted Martinson's motion, denied State's motion to dismiss earlier indictment. Special action review – granted relief, finding that State established good cause to dismiss the 2004 indictment without prejudice. Court did not reach issue of whether good cause would have been lacking if State attempted to dismiss in bad faith.
- ▶ Trial court subsequently found bad faith by "deliberately attempting to secure a conviction based on an unchanged theory and by persistently violating the ruling not to argue premeditation."
- ▶ Re: Trial court erred by not allowing State to argue premeditation. Therefore, basis for prosecutorial misconduct was flawed and no basis for dismissal with prejudice.

- ▶ Trial court's decision was based on a flawed interpretation of *State v. Styers*, in which Arizona Supreme Court held that the defendant could not be convicted of both murder and child abuse. That decision was limited, and specifically did not apply to child abuse as a predicate felony for felony murder.

- ▶ *Allen v. Sanders*
- ▶ Special Action from trial court's decision not to independently determine whether probable cause existed for child abuse offenses that would be tried with murder case and used as aggravators.
- ▶ H: Trial court was required to independently determine probable cause for aggravators as part of Chronis hearing. Court of appeals relies on *Sanchez v. Ahlley*, in which trial court had the grand jury determine aggravators, and Arizona Supreme Court reversed.
- ▶ Dissent: No error – the underpinnings of *Sanchez* were that grand jurors have limited authority – to charge public offenses; here the grand jury did just that, and trial court made the determination that the charged offense would be an aggravator if the defendant is ultimately convicted of the offense.
- ▶ Supreme Court has granted review